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In The

Supreme Court of the United States

October Term, 1997

BANDILA SHIPPING INC.; PALM MARITIME S.A.; and the M/V GRACIOUS, her Engines, Tackle, Apparel, Furniture and Appurtenances, *In Rem*,

Petitioner/Cross-Respondents,

v.

ERICA KAUR GHOTRA and RAVINDER SINGH GHOTRA, minors, by SUSAN GHOTRA, their guardian ad litem; SUSAN GHOTRA, as Administrator of the Estate of KULDIP S. GHOTRA; AMOLAK SINGH GHOTRA; and SARJIT KAUR GHOTRA,

Respondents/Cross-Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a self-employed marine surveyor is a "covered employee" under the Longshore & Harbor Workers' Compensation Act for purposes of the "seafarer" test announced by this Court in *Yamaha Motor Corp. v. Calhoun*, ___ U.S. ___, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).

2. Whether the LHWCA preempts state wrongful death remedies that otherwise would be available to the survivors of self-employed maritime workers.

LIST OF ALL PARTIES

Conditional cross-petitioners Erica Kaur Ghotra and Ravinder Singh Ghotra are individuals and minor children. Conditional cross-petitioner Susan Ghotra is their guardian ad litem, an individual of the age of majority, and the adminstratrix of the estate of Kuldip S. Ghotra.

In the petition for writ of certiorari, petitioner/cross-respondent Bandila Shipping Inc. represents that it is incorporated in The Philippines and has no parent or subsidiary companies, and petitioner/cross-respondent Palm Maritime S.A. represents that its parent companies are Nichimen Corporation, Trading House of Japan, and Mar de Gloria S.A.

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the Ninth Circuit appears at *Ghotra v. Bandila Shipping Inc.*, 113 F.3d 1050 (9th Cir. 1997).

JURISDICTION

The decision of the court of appeals was entered on May 13, 1997. Petitioners Bandila Shipping Inc., Palm Maritime S.A. and the M/V GRACIOUS filed a petition for rehearing with a suggestion for rehearing en banc on May 27, 1997. The petition was denied and the suggestion rejected on July 1, 1997. Petitioners filed their petition for writ of certiorari on September 29, 1997; that petition was placed on the docket of this Court on October 1, 1997, and this conditional cross-petition for writ of certiorari was filed within 30 days thereafter, as provided in S. Ct. R. 13. This Court has jurisdiction of both petitions under 28 U.S.C. § 1254(1). The questions presented by this conditional cross-petition arise under a federal statute, 33 U.S.C. §§ 901-933, including a question of preemption under the supremacy clause of the U.S. Constitution.[1] Subject matter jurisdiction is based on 28 U.S.C. § 1331.

STATUTES INVOLVED

The questions presented by this cross-petition require interpretation of the scope of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-933, as well

[1] U.S. CONST. art. VI, cl. 2.

as whether the act preempts the state law remedies available to self-employed maritime workers and their survivors.

STATEMENT OF THE CASE

On September 30, 1991, Captain Kuldip S. Ghotra, father of cross-petitioners Erica Kaur Ghotra and Ravinder Singh Ghotra, and husband of cross-petitioner Susan Ghotra, was fatally crushed between the opening hatch covers of the M/V GRACIOUS, a ship on which he was performing an inspection in the Port of Los Angeles, within the territorial waters of the State of California. Cross-petitioners, the Ghotras, filed suit in the United States District Court for the Central District of California against petitioners/cross-respondents Bandila Shipping Inc. ("Bandila") and Palm Maritime S.A. ("Palm"), as well as against the M/V GRACIOUS, *in rem*. Among other claims, the Ghotras asserted causes of action against Bandila and Palm under the California wrongful death statute. On motion by Bandila and Palm, the district court struck the Ghotras' California state law claims and their demand for a jury trial, tried their remaining claims in a bench trial, and granted judgment to Bandila, Palm and the M/V GRACIOUS, dismissing the claims against them on August 26, 1993.

The Ghotras appealed, and the Court of Appeals for the Ninth Circuit remanded for a determination by the district court of whether Captain Ghotra was a "seafarer"

within the meaning of *Yamaha Motor Corp. v. Calhoun*.[2] On remand, the district court held that decedent was a covered employee under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), even though he was self-employed, and hence a "seafarer" under *Yamaha*.[3] The Ninth Circuit affirmed in part, reversed in part, and remanded the case for a new trial before a jury. The court of appeals affirmed the district court's determination that the Ghotras' California wrongful death claim was pre-empted by the LHWCA.[4] The appellate court reversed and vacated the judgment for defendants and remanded for a new trial on the ground that the Ghotras were entitled to a trial by jury under the seventh amendment of the Constitution.[5]

Bandila, Palm and the M/V GRACIOUS filed a petition for rehearing, which the court of appeals denied, and a suggestion for rehearing en banc, which the court of appeals rejected on July 1, 1997.[6] On September 29, 1997, Bandila, Palm and the M/V GRACIOUS filed a petition herein seeking review of the Ninth Circuit's determination that the Ghotras have a constitutional right to try their claims to a jury. The Ghotras file this conditional cross-petition because they believe that the Ninth Circuit erred in holding that the decedent was a "covered

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[2] ___ U.S. ___, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).

[3] Ghotra v. Bandila Shipping, Inc., 1996 A.M.C. 2424 (C.D. Cal. 1996); Ghotra v. Bandila Shipping Inc., 113 F.3d 1050, 1058-59 (9th Cir. 1997).

[4] 113 F.3d at 1059-60.

[5] Id. at 1056-58.

[6] Bandila's Pet. at App. 30-31.

employee" under the LHWCA and a "seafarer" within the meaning of *Yamaha*,[7] and thus erred in holding that the LHWCA preempted the Ghotras' state law claims. This conditional cross-petition seeks review of the appellate court's affirmance of the dismissal of the Ghotras' California wrongful death action.

The facts bearing on the questions presented by this conditional cross-petition are simple and straightforward. Captain Ghotra was killed while working aboard an oceangoing vessel, the M/V GRACIOUS, while the ship was moored to a dock in the Port of Los Angeles, within the territorial waters of the State of California. At the time of his death he was working as an independent contractor to the ship's charterer, which was not a party to the appeal. Crucially, Captain Ghotra was self-employed, and was operating under a "dba" or fictitious business name. He did not have an employer and was no one's employee.[8]

REASONS FOR GRANTING THE CONDITIONAL PETITION

I.

Decedent Was Not a Covered Employee Under the LHWCA

When a person is wrongfully killed on navigable waters of the United States which are within the territorial waters of a state, the survivors and estate may

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[7] ___ U.S. ___, 619 S. Ct. 619, 133 L. Ed. 2d 578.

[8] *Ghotra*, 113 F.3d at 1052-53, 1059; 1996 A.M.C. at 2425-26.

bring an action for wrongful death under the applicable state law – unless that law has been preempted by federal maritime law. In *Yamaha*[9] this Court determined that the federal maritime law wrongful death action created in *Moragne v. States Marine Lines, Inc.*[10] does not supply the exclusive remedy in cases involving the deaths of "non-seafarers" in territorial waters.[11] This Court defined non-seafarers as "persons who are neither seamen covered by the Jones Act, 46 U.S.C.App. § 688 (1988 ed.), nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*"[12] The persons covered by these two acts of Congress are the only persons as to whom state wrongful death remedies have been preempted by the maritime wrongful death action created in *Moragne*.[13]

In this case, the district court found, and the Ninth Circuit affirmed, that Captain Ghotra was a "seafarer" within the meaning of *Yamaha* because he was a worker covered by the LHWCA.[14] The reviewing court, accordingly, held that the Ghotras' wrongful death claim under California law was preempted by federal maritime law. The Ghotras believe that because he was self-employed Captain Ghotra was not covered by the LHWCA. Therefore, he was not a seafarer under *Yamaha*, and *Moragne*

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[9] 116 S. Ct. 619.

[10] 398 U.S. 375 (1970).

[11] 116 S. Ct. at 623, 628.

[12] 116 S. Ct. at 623 n.2.

[13] Id.

[14] *Ghotra*, 113 F.3d 1050, 1058-60.

does not preempt, with the result that the Ghotras are entitled to avail themselves of the remedies provided by California law, including California's wrongful death statute. This conditional cross-petition asks this Court to review the Ninth Circuit's contrary holding.

Reasoning that cross-petitioners' decedent was engaged in maritime employment at the time of his death, the Ninth Circuit agreed with the district court's determination that Captain Ghotra was a covered employee under the LHWCA: "Indisputably, Captain Ghotra satisfied the status and situs test for coverage under the LHWCA; he was killed on a vessel on navigable waters while engaged in traditional maritime employment."[15] The panel felt that "[t]o treat him differently because he was self-employed would contradict the overall goal of uniformity . . . and promote unpredictability. . . . "[16] Focusing on the notion of uniformity rather than the language of the statute, the Ninth Circuit concluded that the decedent was covered by the LHWCA even though he was self-employed. The Ghotras' California wrongful death claim was, thus, held preempted by a statute that does not afford Captain Ghotra's survivors a remedy for wrongful death.

The LHWCA is a compensation scheme that regulates the rights and liabilities of maritime employers and employees *inter sese*.[17] By enacting the LHWCA, Congress

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[15] Id. at 1059 (citing Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 265 (1977)).

[16] 113 F.3d at 1059.

[17] *See, e.g.*, LHWCA § 3, 33 U.S.C. § 903 (1994), which secures compensation in the event of an employee's disability or

preempted maritime employees' tort claim rights in favor of a federal regime of absolute, fixed compensation. The LHWCA, however, makes no provision for self-employed maritime workers; it applies solely to maritime workers who are employed by maritime employers.[18] It is not remarkable that a workers' compensation scheme should apply only in the context of employer-employee relationships. The purpose of workers' compensation, after all, is to replace the common-law tort regime with a program of limited employer liability based not on fault but on the existence of the employment relationship.

This is why the Ninth Circuit's ruling is so wide of the mark: The LHWCA provides no compensation for self-employed maritime workers, as the court of appeals concedes:

> We do not disagree that the requirement of a "master-servant" relationship may be necessary to justify liability without fault against a putative employer. However, the fact that Captain Ghotra is unable to recover against an employer under the instant circumstances does not take him out of the scope of the LHWCA.[19]

Thus, in the Ninth Circuit's view, the LHWCA applies even to those to whom it affords no compensation

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death, and section 4, 33 U.S.C. § 904 (1994), which imposes on employers the obligation to provide such compensation.

[18] *See* the definitions of "employee" and "employer" at LHWCA § 2(3) and § 2(4), respectively, 33 U.S.C. § 902(3), (4) (1994).

[19] Id.

and no remedy for death. This ignores the logical limitation of all workers' compensation statutes: that they function solely in the context of a master-servant relationship.

The LHWCA does not attempt to cover or regulate the rights and liabilities of the self-employed. This Court recognized this fact more than 60 years ago when asked to review the constitutionality of the LHWCA. In *Crowell v. Benson*,[20] the Court noted that the act applies only when there is such a relationship:

> The act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from any injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings may not validly be provided by State law," *and it applies only when the relation of master and servant exists*. Section 3.[21]

Further on in *Crowell* the Court reiterated this fundamental limitation of the LHWCA: "The statute has a limited application, being confined to the relation of master and servant."[22] Indeed, "the fact of that relation is the pivot of the statute."[23]

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[20] 285 U.S. 22 (1932).

[21] Id. at 37-38 (citing LHWCA § 3, 33 U.S.C. § 903) (emphasis added; footnote omitted).

[22] 285 U.S. at 54.

[23] Id. at 56.

The Ghotras asked the Ninth Circuit to consider not only *Crowell* but also the legislative history of the 1972 amendments to the LHWCA. *Pace* those who reason that legislative history is no substitute for legislative silence, the Ghotras cite the House Report on the amendments, not to fill a gap in the statute but simply to clarify the fact that the LHWCA applies only in the context of an employment relationship. We have, said the House committee, "no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part [,] in some form of maritime employment."[24]

Although asked to consider the plain language of the LHWCA and its interpretation in *Crowell*, the Ninth Circuit found that Captain Ghotra was an "employee" within the meaning of the act despite the fact that he was self-employed. The panel opined that the LHWCA does not require "that the employee be employed by a separate 'employer' entity."[25] Addressing the Ghotras' assertion that the LHWCA does not apply to the self-employed because it is limited to the "master-servant" relationship,[26] the panel replied:

> *Crowell* and the other cases cited by the Ghotras address recovery against an employer pursuant to the LHWCA's remedial scheme. We do not

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[24] H.R. REP. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4698, 4708.

[25] 113 F.3d at 1059.

[26] *Crowell*, 285 U.S. at 37-38, 54, 56.

> disagree that the requirement of a "master-servant" relationship may be necessary to justify liability without fault against a putative employer. However, the fact that Captain Ghotra is unable to recover against an employer under the instant circumstances does not take him out of the scope of the LHWCA.[27]

The Ghotras submit that since the LHWCA did not provide a compensation scheme for Captain Ghotra, he simply was not covered by the act. The Ninth Circuit provided no explanation for its conclusion that the decedent was subject to the LHWCA even though it afforded no remedy for himself or his survivors. The panel held that the remedy which the LHWCA did not provide them nevertheless preempted the Ghotras' state law remedies. That conclusion is reversible error both because the LHWCA applies only when there is an employment relationship and because the LHWCA cannot constitutionally preempt state law remedies when it provides the self-employed with no federal remedies in return.

Despite the LHWCA's unambiguous language, the House report, and *Crowell*'s emphasis on the necessity of a "master-servant" relationship, the Ninth Circuit held that Captain Ghotra's wife and children are deprived of a state wrongful death remedy because – if he *had* had an employer, which he did not – he would have been covered by the LHWCA. The Ninth Circuit conceded that Captain Ghotra was "unable to recover against an

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[27] 113 F.3d at 1059.

employer under the circumstances,"[28] the "circumstances" being that he had no employer. It held that although Congress did not confer the benefit of compensation on Captain Ghotra during his lifetime, his survivors may not avail themselves of state law remedies because the decedent could have got benefits if he had only had an employer. The Ghotras ask this Court to review the Ninth Circuit's determination that Captain Ghotra was covered by the LHWCA and was thus a seafarer under *Yamaha*.

II.

The LHWCA Does Not Preempt State Law As to Self-Employed Persons

Cross-petitioners ask this Court to review and reverse the holding that the LHWCA preempts their right to bring an action under the California wrongful death statute. Given the want of a "master-servant" relationship, self-employed maritime workers are not covered by the LHWCA, and thus are not seafarers as defined in *Yamaha*.[29] The Ninth Circuit's error is more than just a misinterpretation of the LHWCA and *Yamaha*; it is as well (and more disturbingly) a ruling that the survivors of self-employed maritime workers are to be deprived of state remedies under a theory of federal preemption though there is no preemption at all.

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[28] Id.

[29] 116 S. Ct. at 623 n.2.

As this Court explained more than 25 years ago, "[t]he constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[30] In this instance, the Ninth Circuit has erred in concluding that Congress exerted any authority over the subject matter of self-employed maritime workers. The LHWCA is not an example of what this Court has termed "a complete scheme of regulation. . . . "[31] The regulation of maritime workers is less than complete, because Congress has chosen to limit the compensation scheme embodied in the LHWCA to employees of maritime employers.

In reviewing a preemption question, as Justice Black wrote in *Hines*, this Court's "primary function is to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[32] This Court still applies the standard described in *Hines*.[33] Because the LHWCA provides the Ghotras no remedy at all for the death of Captain Ghotra, it follows that California's wrongful death statute does not stand as an obstacle to the purposes and objectives of

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[30] Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-86 (1971).

[31] Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

[32] Id. at 67.

[33] *See, e.g.*, Freightliner Corp. v. Myrick, ___ U.S. ___, 115 S. Ct. 1483, 1487, 131 L. Ed. 2d 385 (1995); English v. General Elec. Co., 496 U.S. 72, 79 (1990).

the LHWCA. Under this Court's principles for resolving preemption questions, the LHWCA has not preempted the Ghotras' state wrongful death claim, and cross-petitioners should be allowed to present that claim in the new trial they have been granted.

III.

Conclusion

Yamaha teaches that state remedies for wrongful deaths occurring in territorial waters are preempted by the federal maritime wrongful death action created by *Moragne*[34] only if the decedent was a "seafarer," *i.e.*, a seaman covered by the Jones Act or a longshore worker covered by the LHWCA.[35] In the case of Captain Ghotra, *Moragne* does not preempt the California wrongful death statute because Captain Ghotra was not a Jones Act seaman and was not a covered employee under the LHWCA. He was not covered by the LHWCA because he was self-employed at the time of his death and because the LHWCA does not apply to the self-employed. Although Congress entered the field of maritime employment by enacting the LHWCA as a maritime employees' compensation scheme, the act was not a complete preemption of the state law rights of maritime workers; it preempts only the state law rights of employees who are employed by maritime employers, and does not affect the rights of the self-employed. The LHWCA affords no federal remedies for any self-employed maritime worker and his or her

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[34] 398 U.S. 375.

[35] 116 S. Ct. 623 & n.2, 628.

survivors. Thus, the act should not be held, as the Ninth Circuit has done, to preempt the only remedies left to the self-employed and their survivors – their remedies under state law.

The questions presented by this conditional cross-petition are bound up with the questions raised by the petition. If the Ghotras are entitled to the remedies afforded by California law, in particular the California wrongful death statute, then they are entitled by the seventh amendment of the Constitution to a jury trial of these state law claims. The petition filed by Bandila, Palm and the M/V GRACIOUS asserts that the Ghotras have no seventh amendment right to a jury trial of the claims the court did not dismiss, and it is possible that this Court could reach a different result in deciding the petition if it determines that the Ghotras are entitled to bring a claim for wrongful death under California law.

DATED: October 29, 1997

Respectfully submitted,

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